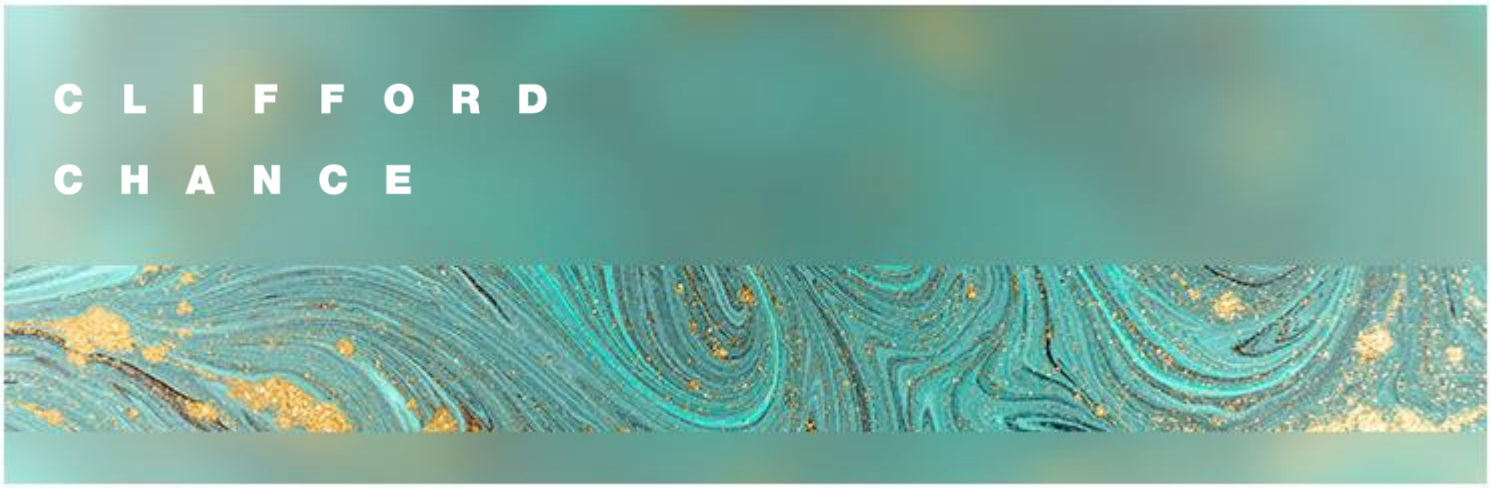

CORONAVIRUS AND DEBT RESTRUCTURING UNDER BELGIAN LAW

The Coronavirus outbreak has posed major challenges to businesses globally. Many will prove to be sufficiently robust, and the far-reaching measures put in place by governments, regulators and the financial sector will help them to weather the storm. Businesses which are especially troubled by the crisis will, however, have difficult choices to make, especially as the precise impact on their operations and financial condition may be difficult to assess at this stage. An adequate and timely response to the rapidly evolving situation and appropriate contingency planning are key to overcoming the crisis.

In this briefing, we demystify the restructuring options available to Belgian companies in light of the new temporary moratorium regime, and we consider the pros and cons of these options to businesses from a practical perspective.

Key issues

- New temporary moratorium regime in Belgium suspending bankruptcies/ enforcement measures and the termination of contracts due to payment default
- Temporary moratorium regime compared with judicial reorganisation moratorium
- Appropriate preparedness planning may require engaging in a comprehensive debt restructuring process
- Restructuring options include out-of-court settlement and judicial reorganisation
- Pros and cons of judicial reorganisation and timing considerations
- Specific restructuring challenges for companies that have issued bonds

AUTOMATIC SUSPENSION OF ENFORCEMENT MEASURES AND INSOLVENCY FILINGS

The Special Powers Royal Decree no. 15 provides for a temporary moratorium on bankruptcy proceedings and enforcement measures (including executory attachments and conservatory attachments). It also introduces a temporary ban on the termination of pre-existing contracts solely due to payment default.

This regime applies automatically from 24 April 2020 until 17 May 2020 (subject to possible extension by Royal Decree) and applies to all companies or other enterprises whose continuity is threatened by the Coronavirus crisis but which were not in cessation of payments as at 18 March 2020.

The temporary moratorium applies as follows:

- the company may not be declared bankrupt nor be made subject to judicial dissolution upon the initiative of unpaid creditors, but it may still be declared bankrupt upon the initiative of the public prosecutor's office or if the company consents to it; similarly, if a company satisfies the conditions for bankruptcy, but only because of the Coronavirus outbreak, then its directors' obligation to file for insolvency is suspended (but the directors may still decide to do so on a voluntary basis);

- subject to certain exceptions, such as in relation to real estate assets, a creditor cannot pursue any conservatory or executory attachments. Conservatory attachments made prior to 24 April 2020 (when the new regime came into force) remain valid;
- the payment due dates set forth in a collective reorganisation plan adopted in judicial reorganisation proceedings initiated before or after the onset of the moratorium are automatically extended by a period equal to the duration of the moratorium;
- contracts (other than employment contracts) concluded before 24 April 2020 may not be terminated solely by reason of payment default of the other party to the contract. Termination remains possible for other types of default, subject to limitations arising from the rules of force majeure and the doctrine of abuse of rights.

The Royal Decree no. 15 does not affect a company's payment obligations. Payments thus remain due and default interest will accrue and can be claimed after the end of the moratorium.

The moratorium applies automatically, but any interested party may request the Court to rule that a company or an enterprise does not fall within the scope of the standstill, or to lift the standstill in whole or in part.

Lastly, the Royal Decree encourages the provision of new credit during the moratorium by disapplying certain hardening period rules and limiting the liability of the providers of new credit. Pre-existing loans or extensions of credit that are renegotiated are excluded from these special rules.

Some points to note:

- Controversially, notwithstanding the moratorium, the Royal Decree does not provide for a corresponding extension of the pre-bankruptcy suspect period (hardening period).
- Contractual remedies such as the defence of non-performance, retention rights, and set-off rights are not affected by the moratorium, and the financial collateral law remains applicable.
- Furthermore, in the case of contracts with an international element, the impact of this temporary moratorium may give rise to complex legal issues.

RESTRUCTURING OPTIONS AVAILABLE UNDER BELGIAN LAW

The temporary moratorium established by the Royal Decree no. 15 and the far-reaching measures taken by the government and the financial sector in Belgium will help mitigate the financial implications of the Coronavirus crisis.

As the situation continues to evolve, however, more and more companies will prepare to reorganise their business and renegotiate their debts to enable them to continue their operations.

This section looks at the restructuring options available under Belgian law and considers the pros and cons to businesses from a practical perspective.

Out-of-court settlement

In some cases, an affected company will manage to find a commercial solution by securing support from its (main) creditors, and will accordingly be able to implement debt restructuring measures on a consensual basis without engaging in a formal process. A consensual restructuring will typically be implemented by way of a bespoke agreement between the company and its (main) creditors, describing the relevant measures (which may include a standstill, debt rescheduling, debt-to-equity conversions, and/or the provision of new money).

The automatic moratorium established by the Royal Decree no. 15 is intended to facilitate the conclusion of out-of-court settlement arrangements.

In Belgium, an out-of-court restructuring agreement may be "upgraded" to a protected status by (i) filing the agreement with the insolvency registry and (ii) (optionally) requesting the court to ratify it. To this end, the restructuring agreement must explain why its measures are useful for the reorganisation of the company, and must include certain specific clauses.

If the agreement is filed with the insolvency registry, then the protection is twofold:

- the arrangement would not, in the event of subsequent insolvency, be captured by most hardening period risks; and
- the creditors who are party to the agreement would not incur liability vis-à-vis the company or any other creditor or third party solely because the out-of-court settlement eventually failed to save the company.

If the agreement is also ratified by the court, then the creditors will have executory title in respect of the claims referred to in it. However, the fact that the agreement will be examined by the court may attract attention and publicity. By contrast, if the agreement is simply filed in the insolvency register, it will be protected against disclosure and will not be accessible to third parties without the company's consent.

Judicial reorganisation

If debt restructuring on a consensual basis is not feasible or appropriate, then a judicial reorganisation procedure may provide a solution. In a judicial reorganisation, the company benefits from a moratorium protecting it against enforcement action by its creditors. This allows it to restructure its debts and

activity either through a "voluntary arrangement" with one or more of its creditors, a "collective reorganisation plan" submitted to the vote of the creditors, or the sale of all or part of the business or activity.

There are significant exceptions to the moratorium in a judicial reorganisation, notably in respect of security over receivables which are "specifically" pledged (which remains enforceable) and security over cash accounts or close-out netting (which remain enforceable notably in case of payment default). Furthermore, creditors remain entitled to invoke other mechanisms, such as set-off, rights of retention and the defence of non-performance (where for this purpose set-off between debts arising before the moratorium, and debts arising during the moratorium, is only permitted if the debts are closely connected).

In addition to the moratorium, a judicial reorganisation procedure has certain other advantages for businesses facing financial difficulties. Creditors are incentivised to cooperate since beneficial terms attach to the funding they provide during this period, where they will benefit from a super-preference for any new liabilities incurred during the judicial reorganisation procedure if the company subsequently becomes bankrupt. If such funding is provided during the automatic moratorium established by the Royal Decree no. 15, then the protections established by this Royal Decree for new credit granted during the moratorium will also apply.

There are also a number of disadvantages to judicial reorganisation. The decision to open the proceedings will be published in the annexes to the Belgian State Gazette and, if the reorganisation involves a plan being put to the vote of the collective creditors, the company must notify all of its creditors of the existence of the proceedings. Moreover, the applicable rules do not disapply the legal requirements with respect to the consultation and information of the employee(s) (representatives) of the company.

Other creditors, such as bondholders (if applicable), but also the public at large (including investors, suppliers, project parties), would therefore become aware of the existence of the proceedings. As soon as third parties become aware of the (intended) filing for a judicial reorganisation procedure, there is an increased risk that they would attempt to take action to preserve their rights. Furthermore, the opening of judicial reorganisation proceedings may trigger cross-default clauses in agreements entered into by other companies of the same group, and the opening of these proceedings does not prevent certain security interests from being enforced.

In addition, no cramdown of secured creditors is possible, as a debt waiver or conversion of debt into equity may only be applied in respect of secured creditors subject to their individual consent. This, and the fact that tax and social security claims benefit from preferential treatment, may in certain circumstances jeopardise the prospects of a successful restructuring.

A further consideration is that a company must still have sufficient liquidity to be able to "bridge" the period required to complete the judicial reorganisation process. It is therefore crucial that the proceedings are not opened too late and can proceed sufficiently quickly. Even if the judicial reorganisation can, to some extent, be prepared in advance (for example by already identifying suitable buyers in case of transfer of business) and the debtor remains in possession during the reorganisation proceedings, it is inevitable that there will be some loss of control over the process and its timing.

Prior to entering into judicial reorganisation, the pros and cons should therefore be carefully considered, as well as the optimal timing for implementing such a process.

THE TEMPORARY MORATORIUM COMPARED WITH JUDICIAL REORGANISATION MORATORIUM

The moratorium established by the Royal Decree no. 15 is an emergency response to contain the economic effects of the Coronavirus outbreak and as such, it is only intended to apply for a short period of time. Furthermore, the temporary measures do not provide full protection against enforcement measures, which may limit their effectiveness in certain circumstances.

The table below sets out the key differences between the temporary moratorium established by the Royal Decree no. 15 and the moratorium applicable in a judicial reorganisation procedure.

	Temporary moratorium (RD no. 15)	**Judicial reorganisation moratorium**
Duration	Currently set to expire on 17 May 2020 (it is not clear whether it will be extended)	Initial duration not exceeding 6 months, which may subsequently be extended to 18 months
Scope (assets)	All assets other than real estate assets (conservatory attachments over vessels and boats remain possible)	All assets, including real estate assets
Impact on other mechanisms (set-off, rights of retention, defence of non-performance)	Such mechanisms remain enforceable (subject to limitations arising from the doctrine of abuse of rights)	Such mechanisms remain enforceable (subject to limitations arising from the doctrine of abuse of rights), however, set-off between debts arising before the moratorium, and debts arising during the moratorium, is only permitted if the debts are closely connected
Impact on financial collateral arrangements and close-out netting	- The enforcement of security over bank accounts remains possible (although the six-month repayment moratorium for bank loans may limit the ability of banks to exercise their rights to a certain extent) - The enforcement of close-out netting provisions remains possible	- Pledges over bank accounts are only enforceable in case of payment default, or if certain other conditions are met - Close-out netting provisions are only enforceable in case of payment default, or if certain other conditions are met

There are also certain differences between the protective measures which apply to new credit pursuant to the Royal Decree no. 15, and the equivalent measures which apply in a judicial reorganisation or out-of-court settlements filed in the insolvency register (so-called "protected" out-of-court settlements). The table below provides a comparison.

<table>
<tr><th></th><th>Royal Decree no. 15 – Protective regime for new credit</th><th>Judicial reorganisation or "protected" out-of-court settlement – Protective regime for lenders/creditors cooperating with the restructuring</th></tr>
<tr><td>Scope</td><td>Only new credit (pre-existing extensions of credit that are renegotiated are excluded)</td><td>More general (not only new credit)</td></tr>
<tr><td>Disapplication of hardening period rules</td><td colspan="2">Disapplication of rules on unenforceability of:
- transactions entered into or performed during the pre-bankruptcy suspect period where the lender was aware of the debtor’s cessation of payment</td></tr>
<tr><td></td><td>- N/A</td><td>- payments for debts which are not due or payments other than in cash for debts due, or security provided for pre-existing debts, in each case during the pre-bankruptcy suspect period</td></tr>
<tr><td>Super-priority in case of subsequent bankruptcy</td><td>No super-priority in case of subsequent bankruptcy</td><td>- Judicial reorganisation: super-priority of (for example) loans drawn during the judicial reorganisation proceedings (under pre-existing or new loan agreements) in case of subsequent bankruptcy
- "Protected" out-of-court settlement: no super-priority in case of subsequent bankruptcy</td></tr>
<tr><td>Lender liability limitation</td><td colspan="2">No lender liability solely on the basis that the new credit or the restructuring agreement (as applicable) has not in fact enabled the continuity of all or part of the assets of activities of the company</td></tr>
</table>

RESTRUCTURING OF BONDS - SPECIFIC CONSIDERATIONS

Companies which have issued bonds may encounter specific challenges in restructurings. It will be necessary to convene a general meeting of bondholders, and to verify whether the proposed debt restructuring measures fall within the scope of its competences. If an element of uncertainty remains, then this may give rise to an increased litigation risk associated with the restructuring.

Furthermore, meetings of bondholders will generally require a wide distribution of the convening notice, which may need to be published in the Belgian State

Gazette and/or general newspapers in Belgium. This may create a degree of transparency and public awareness which may not be desirable prior to the restructuring being fully approved. Finally, there may be procedural delays (for example the need to adjourn meetings due to lack of quorum), which would need to be factored in to the overall timetable.

DIFFICULT CHOICES

Radical debt restructuring measures may appear to be premature at this stage given the uncertainty as to how the crisis will continue to evolve.

Furthermore, if numerous companies seek judicial protection in the coming months, then this may put additional strains on other businesses and even endanger major parts of the economy, thereby worsening the effects of the crisis. This may also lead to overwhelming the judicial system at a time when the functioning of the courts is already significantly affected by the Coronavirus crisis.

However, directors of companies operate within a legal framework which requires them to act in the interest of their company, and to consider what is the best course of action for their company and its stakeholders on a timely basis. The temporary moratorium established by the Royal Decree no. 15 may give companies some breathing space, but it does not address the medium- or long-term impact to their business and financial position.

Therefore, it is advisable for companies affected by the crisis to be prepared and to start reflecting on the appropriate time to commence negotiations with their creditors and, if necessary, enter into judicial reorganisation as swiftly as possible.

- Some companies will come to the conclusion that it is not necessary to engage in a comprehensive out-of-court or judicial debt restructuring process at this stage. Instead, they will implement cost saving measures, rely on funds currently available to them, or rely on government backed emergency funding. If necessary, they will obtain waivers from their lenders and negotiate new terms with their contract parties on a case-by-case basis.
- However, to the extent that the above measures do not appear to be sufficient or adequate for a company to maintain its viability, it is advisable to seek to create the best conditions to enable it to continue to operate in a serene manner, and to implement the measures which will restore its financial sustainability. This may require the company to engage in a debt restructuring process, either on a consensual basis or through the opening of a judicial reorganisation procedure.

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